

Tentative Rulings for December 19, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

12CECG04055 *Phillips v. Amcord* (Dept. 402) Oral argument on the motion of Pneumo Abex, LLC, currently set for Thursday, December 19, 2013, will go forward at 2:00 p.m.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02782 *Britz, Inc. v. Kochergen* (Dept. 403) [Hearing on anti-SLAPP motion and demurrer is continued to January 14, 2014, at 3:30 p.m. in Dept. 403]

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20)

Tentative Ruling

Re: ***Rainwater et al. v. City of Orange Cove***, Superior Court Case No. 13CECG00255

Hearing Date: **December 19, 2013 (Dept. 402) @ 3:00 p.m.**

Motion: Demurrer and Motion to Strike re Second Amended Complaint

Tentative Ruling:

To sustain the demurrer to the complaint without leave to amend. Prevailing party shall submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant.

Explanation:

Plaintiffs' Second Amended Complaint alleges a single cause of action for declaratory relief, in which plaintiffs seek a judicial declaration requiring the City to pay for the cost of constructing the drainage basin, or alternatively, to rent or purchase the drainage basin.

However, in the written agreement Hye Development agreed "to perform certain obligations and provide certain contributions ... which City acknowledges will have an overall benefit to the public and surrounding area," including performing all conditions of approval of the Tentative Map. (Complaint Exh. 1, § 6.01.)

The City requests judicial notice of a minute order from the 6/9/04 City Council Meeting regarding the Tentative Map, in which Hye Development was required to provide the drainage basin as a condition of approval of the development. (RJN Exhs. E, F.)

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack; or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The court "may take notice of local ordinances (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24, 157 Cal.Rptr. 706, 598 P.2d 866) and the official resolutions, reports, and other official acts of a city (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 907, 117 Cal.Rptr.2d 631)." (*Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027, 124 Cal. Rptr. 3d 26, 34 (2011) disapproved on other grounds by *Sterling Park, L.P. v. City of Palo Alto* (2013) 310 P.3d 925.) With the amended request for judicial notice, the subject records have now been properly authenticated. (See *Ross v. Creel Printing & Publ'g Co.* (2002) 100 Cal.App.4th 736,

743.) Accordingly, the request for judicial notice will be granted. (Evid. Code § 452(c), (h).)

Plaintiffs allege that there is an actual controversy in that plaintiffs agreed to provide and construct the ponding/drainage basin as long as plaintiffs received payment for the ponding/drainage basin, and defendants so agreed, and that plaintiffs did not agree or contract to give the ponding/drainage basin to defendant absent payment in the form of reimbursement, fair rental value, or fair market purchase. (SAC ¶ 16.) These allegations are inconsistent with the Written Agreement and the Minute Order issued by the City, which show that Hye Development was obligated to provide the drainage basin as a condition of approval of the Project. Any oral agreement by which the City agreed to pay for the improvement would be unenforceable since it was not in writing. (See Gov. Code § 40602; *G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092; RJN Exh. H, City of Orange Cove Municipal Code § 3.08.010 et seq.) This conditional approval was permissible under Gov. Code § 66475 and Orange Cove Mun. Code §§ 16.32.010 et seq. and 16.36.240 et seq. (RJN Exh. G). Thus, there is no actual controversy regarding the rights and duties of the parties.

Additionally, the cause of action is time barred by Gov. Code § 66499.37, part of the Subdivision Map Act, which requires that an action contesting a condition of approval be filed within 90 days of the decision to impose the condition. “Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations.” (*Id.*) The “clear language [of § 66499.37] manifests a legislative purpose that a decision ... approving a subdivision map and attaching a condition thereto, shall be judicially attacked within 180 days of that decision, or not at all.” (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886.)

The opposition merely asserts that § 66499.37 doesn't apply, but offers no analysis or explanation for this assertion. However, by seeking a declaration that the City should pay for construction or use of the drainage basin, plaintiffs are essentially making a belated challenge to the conditions imposed by the City at the outset of the Project. This is dispositive of plaintiffs' claims as well.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 12/18/2013
(Judge's initials) (Date)

(20) **Tentative Ruling**

(20) **Tentative Ruling**

Re: **Switzer v. Flournoy Management, LLC, et al.**, Superior Court
Case No. 11CECG04395

Hearing Date: **December 19, 2013 (Dept. 402) – NO HEARING / OFF CAL**

Motion: Correct Mistake in Ruling Granting Anti-SLAPP Motion

Tentative Ruling:

To deny as moot in light of the court's revised order denying the anti-SLAPP motion.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 12/18/2013
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Phillips v. Amcord, Inc.***
Superior Court Case No.: 12CECG04055

Hearing Date: December 19, 2013 (**Dept. 402**)

Motions:

(1) By Defendant Amcord, Inc., for summary judgment;

(2) By Defendant Crane Co., for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

The Court intends to continue all pending motions for summary judgment and/or summary adjudication to March 6, 2014, at 1:45 p.m., in Dept. 402. Tentative rulings on all pending motions for summary judgment being continued will issue normally on March 5, 2014. Oral argument on the motion of Pneumo Abex, LLC, currently set for Thursday, December 19, 2013, will go forward. Trial will be continued to April 14, 2014, and trial readiness to April 11, 2014.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 12/18/2013
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***The Diocese of San Joaquin v. Schofield***
Superior Court Case No.: 08CECG01425

Hearing Date: December 19, 2013 (**Dept. 402**)

If hearing is requested – appear at 2:30 p.m.

Motion: By Defendants for order substituting personal representative for deceased defendant

Tentative Ruling:

To grant, ordering that personal representative, Richard Gunner, be substituted into the case in place of decedent Defendant John-David Schofield.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 12/18/2013
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20)

Tentative Ruling

Re: ***Higgins v. Kaiser Permanente et al.***, Superior Court Case No. 09CECG01550

Hearing Date: **December 19, 2013 (Dept. 501)**

Motion: ICSS Holding Corporation's Motion for Summary Judgment and/or Adjudication

Tentative Ruling:

To deny summary judgment. To grant summary adjudication of the eighth cause of action for negligence. To deny all other requests for summary adjudication. (Code Civ. Proc. § 437c.)

Explanation:

The two remaining causes of action against defendant ICSS are the seventh for assault and battery and the eighth for general negligence.

ICSS first contends that these two causes of action are barred by the applicable two-year statute of limitations. (Code Civ. Proc. § 335.1.)

The First Amended Complaint ("FAC") alleges that the incident occurred on 2/18/08. The original complaint was filed on 5/4/09. The security company was not named as a defendant in the original complaint. Rather, it referenced "the security Company (DOE 1)," also referred to therein as "THE KAISER GROUP SECURITY COMPANY." In February 2011, in response to an interrogatory asking for the identity of the security company on the date of the incident, Kaiser identified Securitas Security Services USA. (ICSS Exh. F, Kaiser's response to Special Interrogatory no. 54.) Accordingly, on 4/19/11 plaintiff filed a Doe Amendment, naming Securitas as Doe 1. An amendment to the complaint alleges that Kaiser's counsel initially informed plaintiff that the security guards involved were in-house Kaiser employees. The misinformation was compounded when in April 2011 Kaiser's attorney informed plaintiff's attorney that an outside company, Securitas, provided the security services. In the course of arbitration with Kaiser, plaintiff's counsel was informed in December 2011 that the security company was ICSS. Accordingly, on 12/2/11 plaintiff filed a Doe Amendment identifying ICSS as Doe 1. (ICSS Exhs. C, D.)

Code Civ. Proc. § 474 allows a new defendant to be added by amendment after the statute of limitations has expired and the amendment is deemed to relate back to the filing of the original complaint. (*A.N. v. County of Los Angeles* (2009) 171 Cal.App.4th 1058, 1066.)

ICSS contends that plaintiff improperly swapped one doe defendant for another, relying on *Kerr-McGee Chemical Corp.* (1984) 160 Cal.App.3d 594. However, the plaintiff in *Kerr-McGee* included no allegations concerning fictitiously named defendants in its original complaint, and waited until two years thereafter to amend the complaint to add allegations relating to the fictitiously named defendant allegations for 30 "Does" (of which the medical clinic was not one). *Kerr-McGee* is distinguishable as "its holding rests upon the conclusion that the plaintiff did not even attempt to act pursuant to section 474." (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 363.)

Here, the original complaint did contain Doe allegations pursuant to Code Civ. Proc. § 474. ICSS cites to no authority warranting dismissal of plaintiff's claims merely because the wrong defendant was initially identified as Doe 1.

ICSS then argues that the relation back doctrine does not apply, because plaintiff is barred by the doctrine of laches. But the relation back doctrine relates to adding new causes of action based on the same accident or injuries. (See *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 600-01.) None of the authority cited indicates that the relation back doctrine or delayed discovery rule applies to Doe amendments under Code Civ. Proc. § 474. At any rate, in light of all of the misinformation from Kaiser, the court cannot say that the doctrine of laches should apply to result in the dismissal of plaintiff's claims.

ICSS also seeks summary adjudication of the seventh cause of action for assault and battery. The cause of action alleges that ICSS security personnel chased plaintiff off the hospital, causing him apprehension and fear of assault and battery. ICSS security guard Doe defendant 3 grabbed plaintiff, chased plaintiff, held plaintiff and engaged in other physical unwanted touching against plaintiff's will.

"A battery is any intentional, unlawful and harmful contact by one person with the person of another. ... A harmful contact, intentionally done is the essence of a battery. A contact is 'unlawful' if it is unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611.)

"[A]n assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm." (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6-7, internal citation omitted.) "The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust for Southern California* (1983) 144 Cal.App.3d 222, 232.)

ICSS seeks summary adjudication of this cause of action on the ground that plaintiff's only evidence that he suffered an assault and battery on 2/15/08 is his own deposition testimony that a female security guard, purportedly working for ICSS, attempted to stop him from leaving the hospital and in the process touched him or causes a fear or apprehension of him being touched in a harmful or offensive manner. [I'm not sure where this is in ICSS' separate statement.] Plaintiff was diagnosed

schizophrenic in 1992. (UMF 1.) At the time of the incident he was on a morphine drip that sedated him and caused him to become further mentally incapacitated. (UMF 4.) Plaintiff admitted that his recollection of the incident is poor and that his memory has worsened since the incident. (UMF 17.)

In other words, ICSS' contention is that plaintiff doesn't make the most compelling witness, and he is the sole source of evidence for the claim that an ICSS employee grabbed him. Numerous witnesses testify that there was only one female security guard on duty at the time of the incident, and she was not involved in the incident. (See Herrera, Wilson and Rodriguez declarations, UMF 22-25.) ICSS' version of events is that two male security guards stayed 15-20 feet away actively observing, but doing nothing to stop plaintiff, and stopped following once plaintiff crossed Kaiser's property line. (UMF 11-12.)

ICSS then relies on Code Civ. Proc. § 437c(e), which provides: "If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that **summary judgment may be denied** in the discretion of the court, **where the only proof** of a material fact offered in support of the summary judgment **is an affidavit or declaration made by an individual who was the sole witness to that fact ...**" (Emphasis added.) ICSS erroneously argues that since a motion can be denied where the only proof of a material fact is an individual who was the sole witness to the fact, then by extrapolation the court can **grant** summary judgment where the only evidence of a triable issue of material fact is a testimony from the plaintiff who was the sole witness to that fact.

But section 437c(e) does not preclude a party from raising a triable issue by a single affidavit or declaration. ICSS' argument fails to take account of the shifting burdens between moving and opposing parties (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850). While ICSS' evidence that there was no female security guard involved in the incident is sufficient to shift the burden to plaintiff, ICSS' recognition that plaintiff testified to the contrary is sufficient to raise a triable issue of fact. The motion, at least as to this cause of action, fails right off the bat because the moving papers point out that there is conflicting evidence on a critical issue.

Since this is the sole basis for summary adjudication of the fifth cause of action, it should be denied. "The motion must stand self-sufficient and cannot succeed because the opposition is weak. ... Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue. [Citations] A court generally cannot resolve questions about a declarant's credibility in a summary judgment proceeding [citations], unless admissions against interest have been made which justify disregard of any dissimulation. [Citation]" (*AARTS Prods., Inc. v. Crocker Nat'l Bank* (1986) 179 Cal.App.3d 1061, 1064.)

ICSS also seeks summary adjudication of the eighth cause of action for negligence. With respect to this cause of action, both ICSS and plaintiff are essentially in agreement on what the issue is with regards to this motion. As plaintiff puts it, "[t]he

disputed issue is whether Defendant had a duty under the circumstances to restrain Plaintiff because he was a danger to himself and others.” (Oppo. Ps&As 10:20-21; see ICSS’ Ps&As pp. 11-12.) The parties are in agreement that 22 Cal. Code Regs. § 70577 is the applicable regulation. Section 70577 addresses “Psychiatric Unit General Requirements” of General Acute Care Hospitals. Subsection (j) thereof applies to restraint of patients, and provides:

(1) Restraint shall be used only when alternative methods are not sufficient to protect the patient or others from injury.

(2) Patients shall be placed in restraint only on the written order of the licensed healthcare practitioner acting within the scope of his or her professional licensure. This order shall include the reason for restraint and the type of restraint to be used. **In a clear case of emergency**, a patient may be placed in restraint **at the discretion of a registered nurse** and a verbal or written order obtained thereafter. If a verbal order is obtained it shall be recorded in the patient's medical record and be signed by the licensed healthcare practitioner on his or her next visit.

At the time of the incident, all that ICSS’ security guards knew was that plaintiff was voluntarily leaving Kaiser Hospital. The security guards had not been informed as to plaintiff’s medical condition or medical history related to schizophrenia or any other medical condition. (UMF 13.) Plaintiff purports to dispute this, but presents no evidence actually disputing these facts.

ICSS has produced evidence showing that as plaintiff was leaving the hospital, he exhibited no signs of being a threat to either himself or to others by his actions, referencing UMF 12:

The two male ICSS security guards never touched, assaulted, or threatened Plaintiff and only monitored his behavior while he remained on Kaiser property. Once Plaintiff walked beyond Kaiser property, the two male ICSS security guards stopped following Plaintiff. During the period that Plaintiff remained on Kaiser property, Plaintiff did not display any violent behavior and was simply walking across the parking lot. During this period, the ICSS security guards never came closer than approximately 15-20 feet of Plaintiff.

Plaintiff’s separate statement response to UMF 12 says that this is “Disputed,” but doesn’t specify in what manner. Instead, the word “Disputed” is followed by 7 pages of “Additional Evidence.” Drafted this way, plaintiff’s separate statement is very much unhelpful in assessing what facts are in dispute, and does not comply with the Rules of Court. Opposite each of moving party’s allegedly undisputed material facts, the opposing party’s separate statement response must state either “undisputed” or “disputed.” If disputed, the word should immediately be followed by a reference to the evidence demonstrating that the fact is disputed. (Cal. Rules of Court, Rule 3.1350(h).)

Plaintiff apparently disputes that he wasn’t followed or touched by a female security guard, but there is nothing in plaintiff’s “additional evidence” to indicate that

the security guards knew that plaintiff was mentally incapacitated in any way or were aware of any facts indicating that plaintiff was a danger to himself or others. Thus, this critical fact is undisputed.

ICSS has shown that its security personnel did not know of plaintiff's mental health issues and did not appear to be a danger to himself or others. Apparently all that they were aware of was that a patient was leaving the hospital against medical advice which, generally speaking, is a patient's right. (See *Cruzan v. Dir., Missouri Dep't of Health* (1990) 497 U.S. 261, 269.) Once plaintiff left Kaiser property, ICSS' authority to pursue or intervene ended. (UMF 12.) Plaintiff then continued to walk for another 10 minutes through several other properties before being injured when he attempted to enter a third party vehicle. (UMF 14.)

Plaintiff relies on the contract ICSS had with Kaiser, which provides that security officers are responsible for the protection of Kaiser members. Because this contract is not properly authenticated, the objection to it should be sustained. Even if the court were to consider it, the result would not change. The contract provides that ICSS security officers' duties may include independently and/or assisting in restraining, apprehending and/or detaining staff, members, and visitors exhibiting disruptive behavior ..." (Plaintiff's Exh. 1, § IV.A.1, 2.) Section V.A.1 provides that security officers will perform all necessary services to assure protection of Kaiser members, visitors, staff and employees against injury and molestation. (Plaintiff's Exh. 1, § V.A.1.)

22 Cal. Code Regs. § 70577(j) allows use of restraints where ordered by medical staff. There is no evidence that such an order was made. In fact, the "additional evidence" cited by plaintiff in his separate statement supports ICSS.

Nurse Rincon initially followed plaintiff when he ran past the nurses' station stating, "everyone is crazy, I'm leaving." He was wearing pajama bottoms only, carrying movies and a cell phone, was still hooked up to IC drips, and had a drain hooked up to him to drain excess fluid from the incision. (See Rincon Depo. pp. 87, 91-95, plaintiff's Exh. 4.) When plaintiff was seen running away security was paged "STAT" (meaning emergency). (Rincon Depo. 97:15-17.) Rincon followed plaintiff down three flights of stairs, telling him that he is not stable enough to run and asking him to come back. (Rincon Depo. pp. 97-101.) After plaintiff left the building, Rincon called security and told them plaintiff had left. (Rincon Depo. 105:1-9.)

Rincon went back upstairs and asked nurse Marilyn Rettig to check on plaintiff. (Rincon Depo. 107, 109-110.) Nurse Rettig testified that, as plaintiff started leaving the hospital in his pajama bottoms, she did **not** instruct security to grab or physically stop Higgins, and that they couldn't restrain him "cause he has his rights ... and he wanted to go." He was not threatening towards Rettig, so she felt it was okay to walk with him. (Rettig Depo. 133:4-14.) Rettig added that when she called security, even she had no knowledge of plaintiff's schizophrenia. (133:15-24.) If she didn't know, how was security, summoned by the nurse, to know?

Moreover, the security personnel who responded to the incident (Armando Herrera and John Kessler) state in their declarations that plaintiff was not acting violently

Inasmuch as the negligence cause of action is premised on the contention that ICSS security personnel were negligent in failing to restrain plaintiff, ICSS has shown that it did not breach any duty owed to plaintiff, and plaintiff has failed to produce evidence creating a triable issue of fact. Accordingly, summary adjudication of the eighth cause of action should be granted.

Finally, the court notes that all of plaintiff's evidentiary objections are overruled. ICSS' objections 3 and 4 are sustained. The remainder are overruled.

Tentative Ruling

Issued By: M.B. Smith **on** 12/18/13

(Judge's initials) (Date)

Tentative Ruling

Re: ***Mejia v. Wilson Homes, Inc.***
Case No. 11CECG00797

Hearing Date: December 19th, 2013 (Dept. 501)

Motion: Cross-Defendant Cal-Coat Corporation, dba Fletcher Coating's Motions for Summary Judgment, or in the Alternative Summary Adjudication, of the Cross-Complaints of Wilson Homes and Greene's Plumbing Unlimited

Tentative Ruling:

To deny both motions for summary judgment, or in the alternative summary adjudication. (Code Civ. Proc. § 437c.)

Explanation:

First, much of the evidence submitted by Fletcher is inadmissible. A motion for summary judgment must be supported by admissible evidence, such declarations or discovery responses containing statements under penalty of perjury. (Code Civ. Proc. § 437c(b)(1); *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1025-1026.) Discovery responses must be sworn under penalty of perjury by the party making the response, unless the response consists of only objections. (Code Civ. Proc. §§ 2030.250(a); 2033.240(a).) If the responses are unverified, they are tantamount to no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

Here, both of Fletcher's motions rely entirely on the discovery responses of Ferguson, Wilson and Greene's Plumbing Unlimited. However, the discovery responses of Greene's Plumbing and Ferguson are not verified. Some of the responses contain the statements "verification to follow", but there is no indication that the responses were ever actually verified by the responding parties. Therefore, the responses are tantamount to no response at all, and are inadmissible to support the summary judgment motions.

Fletcher has now submitted verifications for Wilson's responses, so the defect with regard to those responses has been cured. However, the responses of Greene's Plumbing and Ferguson are still unverified, and thus are inadmissible to support the motion.

Fletcher does provide a declaration from one of its attorneys, which purports to authenticate the responses as being "true and correct" copies. (Declaration of Hillman.) However, since Fletcher's counsel has no personal knowledge of the matters contained in the responses, she cannot verify that the responses are true and correct. Therefore, the declaration of counsel does not cure the defect in the responses, and they are inadmissible. Wilson and Greene's Plumbing have objected to all of the

discovery responses. The court intends to sustain the objections as to Greene's and Ferguson's responses, but overrule the objections to Wilson's responses, which have now been verified. (See Wilson's Objections 3, 4, 5, 6, 7, 10, 11, and 12 and Greene's Objections 44-48, and 51-53. The court intends to sustain these objections, but overrule the rest of the objections.)

Also, regardless of the evidentiary problems, the court intends to deny the motions because Fletcher has not met its burden of showing that Wilson and Greene do not possess, and cannot reasonably obtain, evidence necessary to support their cross-claims. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889.) "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.)

"[T]he Supreme Court in *Aguilar* held that pointing out the absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim." (*Gaggero v. Yura, supra*, 108 Cal.App.4th at 891, citing *Aguilar, supra*, 25 Cal.4th at 855.)

Here, the discovery responses relied upon by Fletcher do not necessarily establish that Wilson and Greene do not have, and cannot reasonably obtain, the evidence they need to prove their claims. To the extent that Fletcher relies on the objections raised by Wilson and Greene in their responses, such objections are not the equivalent of an admission that they do not have, and cannot reasonably obtain, evidence against Fletcher. Simply objecting and refusing to answer questions, even if the objection is not well taken, is not the equivalent of a factually devoid response and cannot be used to meet the moving party's burden on summary judgment. (*Gaggero, supra*, 108 Cal.App.4th at 892-893.)

Also, the cross-complainants' substantive answers to the discovery requests were not the equivalent of an admission that they did not have, and could not reasonably obtain, evidence against Fletcher. For example, Fletcher's undisputed fact no. 12 in its motion against Wilson states that "Fletcher did not negligently apply the coating to the pipes." In support of this purported fact, Fletcher points to Wilson's responses to request for admissions, set two, numbers 85 and 86 and Greene's responses to request for admissions, set two, number 86. However, Wilson's response to request for admissions numbers 85 and 86 raised objections and stated that it is "unable to admit or deny this request." Greene also objected and stated that it "currently lacks sufficient information to admit or deny" the request. (Fletcher's Compendium of Evidence Exhibits D and F.)

While these responses might be a concession that Wilson and Greene do not presently have any evidence to show that Fletcher negligently applied the coating to the pipes, they do not say anything about whether Wilson and Greene might reasonably be able to obtain such evidence in the future. Fletcher has not pointed to any other evidence that would tend to show Wilson and Greene will be unable to

In its replies, Fletcher contends that Wilson and Greene cannot prevail on their cross-claims because the reports of experts hired by plaintiffs and Wilson show that the corrosion occurred on the interior of the pipes, and Fletcher's coating was on the outside of the pipes. Thus, Fletcher argues that Wilson and Greene cannot show a causal connection between Fletcher's coating and the harm to plaintiffs. However, Fletcher did not submit any evidence to support these claimed facts as part of its separate statement of material facts in support of its motions, and Fletcher cannot submit new evidence on reply that would cure this omission. (*San Diego Watercrafts v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 504-505.) In any event, Fletcher has not submitted the actual expert reports on which it relies, nor has it properly authenticated them, and counsel's summary of the reports appears to be nothing more than hearsay. Therefore, the court declines to consider the alleged expert reports in ruling on the motions.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: M.B. Smith **on** 12/18/13
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Bank of the Sierra v. Smith***
Superior Court Case No. 13CECG02480

Hearing Date: December 19, 2013 **(Dept. 501)**

Application: Right to Attach Order and Writ of Attachment

Tentative Ruling:

To grant the application. An order in compliance with CCP § 483.015 is to be submitted within 5 days of notice of the ruling. Upon the posting of a bond in the amount of \$50,000 as required by CCP § 484.090(b), the order will be signed.

Explanation:

Attachments in General

Proper Claims

Attachment is a purely statutory remedy. The attachment statutes are subject to strict construction--i.e., unless specifically provided for by the attachment law, no attachment procedure may be ordered by the court. See *Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 761. Generally, an attachment may issue only if the claim sued upon is:

- A "claim for money . . . based upon a contract, express or implied";
- Of a "fixed or readily ascertainable amount not less than \$500";
- That is either unsecured or secured by personal property (including fixtures);

AND

- That is a commercial claim. See CCP § 483.010.

The money claim must be for a "fixed or readily ascertainable amount" of at least \$500 (excluding costs, interest and attorney fees). See CCP § 483.010(a). Claims may be aggregated to reach the minimum \$500. The damages sought need not be liquidated, but must be measurable by reference to the contract itself. See *Lewis v. Steifel* (1950) 98 Cal.App.2d 648, 650. A complaint must be filed before plaintiff may apply for an attachment. See CCP §§ 484.010, 485.210, and 492.020.

Form of Evidence

Plaintiff's declarations must, at the very least, show plaintiff would prevail on the claim for which attachment is sought. In many cases, Plaintiff may be required to make

additional showings (e.g., that an individual defendant was engaged in a trade, business or profession). The defendant must likewise present declarations to support its claims. Unless the Code specifically authorizes facts to be shown by information and belief, the declarant must affirmatively show that if sworn as a witness he or she could competently testify to the facts stated in the declaration. See CCP § 482.040. *At a minimum, this means the declarant must show actual personal knowledge of the relevant facts.* See Evidence Code § 700 et seq. Thus, for example, a declaration should not contain hearsay unless the declarant lays a foundation for an exception to the hearsay rule based on personal knowledge.

Further, all facts must be stated "with particularity." See CCP § 482.040. This means that attachment declarations must contain evidentiary facts, rather than the ultimate facts commonly found in pleadings. Mere conclusions of law or fact are not sufficient. See *House v. Lala* (1960) 180 Cal.App.2d 412, 416 (construing "particularity" requirement of former summary judgment law). If matters are set forth on information and belief (where authorized), the declarant must state the nature and reliability of the information. CCP § 482.040.

Application at Bench

The only evidence offered in support of the application is the Declaration of Stephen Ermigarat and the exhibits attached thereto. It consists of 9 paragraphs. The only documents attached are the promissory note and the Business Loan Agreement.

Nevertheless, Ermigarat states that he is one of the persons with custody and control of the business records of the Bank and he is familiar with their manner of compilation. See Declaration at ¶ 2. He further states that he has reviewed the records pertaining to this loan and that he makes the Declaration based upon his personal review and his personal knowledge. *Id.* at ¶ 4.

In addition, it appears that the terms of the loan were straightforward and that Defendant made the monthly payments required until April 12, 2012 when he failed to make the payment due that month and thereafter. When the entire loan became due on November 12, 2012, he failed to pay. See Declaration at ¶¶ 5-7. Therefore, the requirements of Evidence Code § 700 et seq. and CCP § 482.040. Finally, the Plaintiff's evidence meets the requirements of CCP § 483.010. The claim is for money based upon a contract, not less than \$500, is unsecured and is a commercial claim given that it is based upon a business loan. See Declaration of Ermigarat and the exhibits attached thereto. The Plaintiff has established the probable validity of the claim and that attachment is not sought for an improper purpose. See CCP § 484.090.

In opposition, Smith attacks the requirement that the claim must be of a commercial nature by submitting his own declaration in which he states that he used the proceeds of the loan "primarily for personal, family and household purposes." He further asserts that he told an official of the Bank, Carolyn **Petka** "shortly" after the loan was issued that he was using the funds for his personal needs due to the economic downturn. See Declaration of Smith at ¶¶ 2-3.

However, the Business Loan Agreement attached as an Exhibit B to the Declaration of Ermigarat contains a list of "Affirmative Covenants". One of the covenants required the Borrower to: **"Use all Loan proceeds solely for Borrower's business operations, unless specifically consented to the contrary by Lender in writing."** See Exhibit B at page 2 Section 7 of the Affirmative Covenants. As a policy consideration, if the right of a lender to seek attachment could be circumvented by the borrower deciding to use the funds for personal needs, the statutory right to attachment would be rendered meaningless. Therefore, the opposition has no merit. The application seeking a RTAO will be granted.

Pursuant to California Rules of Court, rule 391(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith **on** 12/18/13

(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Haga v. Haga***

Case No. 09CECG02979

Hearing Date: December 19th, 2013 (Dept. 502)

Motion: Plaintiff's Motions for Entry of Judgment Pursuant to Terms of Stipulated Settlement, and to Appoint Referee to Sell Real Property and for Court's Instructions Regarding Sale

Tentative Ruling:

To grant the motions for entry of judgment pursuant to terms of stipulated settlement, and to appoint a referee to sell the real property. (Code Civ. Proc. §§ 664.6, 873.010.)

However, the proposed order entering judgment pursuant to the settlement does not match the terms of the actual agreement on the record. Plaintiff shall, therefore, present a new proposed order that corresponds to the terms of the parties' agreement on the record.

Explanation:

Under Code of Civil Procedure section 664.6,

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or **orally before the court**, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. (Code Civ. Proc. § 664.6, emphasis added.)

Here, the parties orally agreed to the terms of the settlement on the record before the court. (Exhibit A to Pritchett decl., Court Transcript of February 22nd, 2012, pp. 2:4 – 4:23.) The parties also agreed to have the court retain jurisdiction to enforce the terms of the settlement. (*Id.* at p. 5:3-6.) While defendant later refused to sign the written version of the settlement agreement (Exhibit B to Pritchett decl.), the oral agreement on the record is still enforceable as a separate agreement. Therefore, the court intends to enter judgment pursuant to the terms of the oral agreement on the record.

However, only the terms that are specified in the court transcript are enforceable, not any other terms that are listed in the unsigned written agreement. The proposed order entering judgment does not appear to conform to the language of the

parties' oral agreement on the record. The proposed order simply directs that the property be sold at auction to the highest bidder, that the parties remove their personal belongings from the property, and that the proceeds of the sale, minus the \$1,000 per month that defendant failed to pay to plaintiff, be divided equally between the parties. (Proposed Order, pp. 1-2.)

On the other hand, the parties' actual agreement contains multiple other provisions, including the fact that defendant had to pay plaintiff \$1,000 per month to stay on the property, that defendant had first option to purchase the plaintiff's share of the property for \$125,000, that if defendant failed to purchase the property by September 5th, 2012, then the option would switch to plaintiff to purchase the property for the same amount until January 5th, 2012 [sic, 2013]. (Transcript, p. 2:4-24.) If plaintiff does not purchase the property by January 5th, 2012 [sic], then the parties will put up the property for sale to a third party. (*Id.* at pp. 2:24 – 3:2.) There is also no mention of an offset of the sale proceeds for amounts not paid by defendant. Thus, the proposed order does not appear to accurately reflect the parties' agreement, and the court will require the plaintiff to submit an order that contains the terms of the actual oral agreement.

The court also intends to grant the motion to appoint a referee to conduct the sale of the property. Under Code of Civil Procedure section 873.010(a), in a partition action, "The court shall appoint a referee to divide or sell the property as ordered by the court." The court may also "(1) Determine whether a referee's bond is necessary and fix the amount of the bond. (2) Instruct the referee. (3) Fix the reasonable compensation for the services of the referee and provide for payment of the referee's reasonable expenses. (4) Provide for the date of commencement of the lien of the referee allowed by law. (5) Require the filing of interim or final accounts of the referee, settle the accounts of the referee, and discharge the referee. (6) Remove the referee. (7) Appoint a new referee." (Code Civ. Proc. § 873.010(b)(1)-(7).)

Here, the court intends to order the sale of the property as part of the partition action. However, the parties are apparently unable to agree on a broker to market and sell the property. In fact, it appears that the parties have stopped communicating with each other at all, so a third party referee is necessary to market the property and conduct the sale. Therefore, the court intends to appoint a referee to make the sale, as well as perform any other tasks that need to be performed in connection with the sale. The court will also direct the referee to divide the proceeds of the sale evenly between the parties, except that there will be an offset for the \$1,000 per month that defendant has failed to pay to plaintiff since September of 2012.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 12-16-13
(Judge's initials) (Date)

Tentative Ruling

Sanchez v. Mittal

Hearing Date: December 19, 2013 (Department 502)
Motion: motion by defendant for summary judgment or summary
adjudication

To grant as to plaintiffs Trudy Sanchez and Sheila Rosales, and to deny as to plaintiff Thomas Sanchez.

The Supreme Court denied review for *San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal. App. 4th 1545, 1548:

In this matter, there is no dispute but that Trudy Sanchez and Sheila Rosales were brought into the matter as nominal defendants after the statute of limitations had expired for their claims over the death of their mother, and summary judgment is appropriate as to each of them.

Plaintiff Thomas Sanchez, however, did file his claim within the time period set forth as necessary in defendant's moving papers. It is not appropriate to grant summary judgment as to his claims against defendant.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: DSB on 12-16-13
(Judge's initials) (Date)

Tentative Ruling

Re: **Sequoia Community Health Foundation, Inc. v. Board of Supervisors
of Fresno County**
Superior Court Case No. 269458

Hearing Date: **December 19, 2013 (Department 502)**

Motion: Dissolution of Permanent Injunction

Tentative Ruling:

To continue the hearing to December 31, 2013 at 3:30 in Dept. 502. To require defendant to provide notice of the application and serve all moving papers on plaintiff's former counsel, Central California Legal Services and California Rural Legal Assistance Migrant Farmworker Project (modernly California Rural Legal Assistance, Inc.) as well as Fresno Community Hospital.

Explanation:

Undocumented persons are required to be treated for medical emergencies at any hospital providing emergency care under Health & Safety Code § 1317. Similarly, non-emergency or routine medical care for an undocumented person falls within 8 U.S.C.A. § 1621. Accordingly, the very basis of the injunction, medical treatment for undocumented persons, appears to have been obviated. Such a change in controlling facts or law justifies a dissolution of the injunction. (CCP § 533; CC § 3424; *Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 404, citing *Sontag Chain Stores Co. v. Superior Court*, 18 Cal.2d 92, 94-95.)

However, notice of the application has been provided only to the agent for service of process of the now defunct plaintiff. No notice has been provided to representatives of the real parties in interest, i.e., the undocumented persons. Neither has notice been provided to the provider of the services, Community Hospital. Given the public interests involved, the court will require such notice be provided not later than December 20, 2013 at 5:00 p.m. Defendant board should provide notice of the new hearing date, time and place and serve all pleadings filed in support of the application.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 12-18-13
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Mitchell v. The Boys and Girls Club et al.***
Superior Court Case No. 12CECG01677

Hearing Date: December 19, 2013 **(Dept. 502)**

Motion: By Defendant for summary judgment

Tentative Ruling:

To treat the motion as a motion for judgment on the pleadings and grant with leave to amend. An amended complaint is to be filed within 10 days of notice of the ruling. Notice runs from the date that the minute order is served by the Clerk.

Explanation:

In the instant case, the Plaintiff has pleaded causes of action for negligence and premises liability. The problem lies in the fact that the Plaintiff was not the victim. She suffered no direct harm from the actions of the Defendants. She **lacks standing** to maintain a direct action for negligence or premises liability. She may bring a survivorship cause of action pursuant to CCP § 377.30 (if negligence and premises liability survive the decedent's death). But, she must file an affidavit or declaration pursuant to CCP § 377.32.

In the alternative, she may file a wrongful death cause of action. CCP § 377.60 establishes a separate *statutory* cause of action in favor of specified heirs of a person who dies as a result of the "wrongful act or neglect" of another. Under a wrongful death cause of action, the specified heirs are entitled to recover damages on their own *behalf* for the loss *they have sustained* by reason of the bodily injury victim's death. [See *Corder v. Corder* (2007) 41 Cal.4th 644, 651; *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105] (Although it is a statutorily-created action, a wrongful death suit predicated on *negligence* must still contain the elements of actionable negligence—i.e., duty, breach, causation, damages. *Jacoves v. United Merchandising Corp.*, *supra*, 9 Cal.App.4th at 105.)

A defendant's motion for summary judgment or summary adjudication "necessarily includes a test of the sufficiency of the complaint" and its legal effect is the same as a demurrer or motion for judgment on the pleadings. [See *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court must accept the allegations of the complaint as true. It cannot consider facts alleged in opposing declarations. [*American Airlines v. County of San Mateo*, *supra*, 12 Cal.4th at 1118; *Koehrer v. Sup.Ct. (Oak Riverside Jurupa, Ltd.)* (1986) 181 Cal.App.3d 1155, 1171 (disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654)]

Defendants may argue that the amending of the complaint will serve no purpose because no liability can be asserted regardless of whether the action is filed as a survivorship or a wrongful death. However, the purpose of the real party in interest requirement is to assure that any judgment rendered will **bar** the owner of the claim sued upon from **relitigating**. “It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of some other claimant to the same demand.” [Giselman v. Starr (1895) 106 Cal. 651, 657, 40 P 8, 10; Cloud v. Northrop Grumman Corp. (1998) 67 Cal.App.4th 995, 1003, fn. 2; O’Flaherty v. Belgum (2004) 115 Cal.App.4th 1044, 1094]. Accordingly, the motion for summary judgment be treated as a motion for judgment on the pleadings and granted with leave to amend.

Tentative Ruling

Issued By: DSB on 12-18-13
(Judge's initials) (Date)

Tentative Rulings for Department 503

(19)

Tentative Ruling

Re: ***Kelts v. Perkins, Mann & Everett***
Superior Court Case No. 12CECG01284 c/o 12CECG02414

Hearing Date: December 19, 2013 (Department 503)

Motion: demurrer by cross-defendants Perkins, Mann & Everett and Thornton ("Law Firm") to First Amended Cross-Complaint of Sonya Gage

Tentative Ruling:

To overrule and require an answer in 10 days.

Explanation:

Even if a demurrer is not timely, a motion for judgment on the pleadings would be. The fact is that the new pleading ties Thornton, an existing defendant, in with the newly added defendant, and passes his liability with it along to his current firm. The amendment is more than a mere Doe amendment, and presumably this is why cross-complaint sought leave to file it via a noticed motion. A demurrer is proper.

The contention that there are two separate and independent wrong which must be put into two causes of action, one of which may be demurred to, is incorrect in several ways. First, there is no such thing as a demurrer to part of a cause of action as set forth in a pleading. "A demurrer does not lie to a portion of a cause of action." *Chazen v. Centennial Bank* (1998) 61 Cal. App. 4th 532, 542. See also 5 Witkin, California Procedure, "Pleading," section 1012 on page 423, citing the *PH II* case cited by Gage. That is where a motion to strike is the proper pleading practice.

Further, the damage alleged for the claimed malpractice in the Stock Conveyance Agreement consists of the judgment against Kelts in the Grossman action. Gage alleges that it was improper for the Stock Conveyance Agreement to be drafted in such a fashion as to imply or express a duty on her part to defend or indemnify Kelts for Kelts' own wrongdoing. Because of the breach of that duty, she alleges that the Agreement may be interpreted to call for Gage to pay those damages, as well as to defend Kelts. The allegations of malpractice as to Kelts directly are necessary to state a cause of action against the lawyers and firms for alleged negligence in drafting the Agreement.

A bad agreement, by itself, is just a bad agreement. There is no actionable wrong unless it causes compensable damage. The allegations are not of wrongs necessarily separate and independent of each other; the damage to Kelts is also alleged to be the damage to Gage.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: MWS on 12/18/2013.
(Judge's initials) (Date)